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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

EVAN BROWN, Plaintiff and Respondent, v. KAISER FOUNDATION HEALTH PLAN, INC., Defendant and Appellant.	E069356 (Super.Ct.No. CIVDS1708311) OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Sheppard, Mullin, Richter & Hampton, Moe Keshavarzi and Karin Dougan Vogel for Defendant and Appellant.

Shernoff Bidart Echeverria, Michael J. Bidart, Danica Crittenden; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiff and Respondent.

When plaintiff and respondent Evan Brown (Brown) sued defendant and appellant Kaiser Foundation Health Plan, Inc., (Kaiser) for denying his claim for medical equipment necessary to treat his life-threatening disorder, Kaiser petitioned to compel arbitration under the arbitration provision in the membership agreement between Brown and Kaiser. Brown opposed the petition on the ground the arbitration provision was unenforceable because it had not been "prominently displayed on the enrollment form signed by each subscriber or enrollee" as required by Health and Safety Code section 1363.1, subdivision (b).[1] The trial court agreed and denied the petition to compel arbitration. Because we conclude that the enrollment form does not comply with the statutory requirement, we affirm the order denying Kaiser's petition.

I. PROCEDURAL BACKGROUND AND FACTS

Since birth, Brown has suffered from congenital central hypoventilation syndrome (CCHS),[2] requiring his reliance "on mechanical ventilation while he sleeps." In order to live independently, Brown requires a "ventilator with an internal backup battery and safety alarms required for a life support unit."

Kaiser is a licensed health care service plan under the Knox-Keene Health Care Service Plan Act of 1975 (§ 1340 et seq.). Brown remained continuously insured under a

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[2] According to Brown's complaint, CCHS "is a rare, lifelong and life-threatening disorder present at birth where patients appear to breathe reasonably well while awake but either fail to breathe deeply enough to support bodily function or stop breathing altogether when they sleep."

Kaiser plan, offered by his father's employment, until July 1, 2016, when he turned 26 years old. While Brown was covered by his parents' plan, his mother was his primary advocate; she successfully challenged Kaiser's repeated denials of necessary medical treatment and equipment. Anticipating Brown's aging out of their plan, his mother contacted Kaiser to discuss the insurance options available for her son. Brown and his mother sought an individual Kaiser plan with durable medical equipment coverage (DME), which would provide Brown with the ventilator and supplies he required. Kaiser recommended that Brown enroll in the "Platinum 90 HMO plan" (Platinum Plan), and specifically represented that this plan, "particularly the durable medical equipment section, would cover [Brown's] ventilator and durable medical equipment." Assured that the recommended plan would cover his needs, Brown enrolled in the Platinum Plan with an effective date of July 1, 2016.

On February 2, 2017, Brown called Kaiser to order a replacement mask, tubing, ventilator filters, and more equipment. Kaiser denied his claim because he did not have "any durable medical equipment coverage." Brown, with the help of his mother, appealed; Kaiser affirmed its denial. On May 3, 2017, Brown sued Kaiser for breach of contract and related torts, alleging the improper denial of his claim for benefits. He also sought a temporary restraining order (TRO) and an order to show cause (OSC) for a preliminary injunction. Brown argued that the DME coverage provision in the Platinum Plan was, at best, ambiguous and appeared to promise DME items contained in Kaiser's DME formulary, plus nonformulary items, which were medically necessary and not

specifically excluded. On May 9, 2017, the trial court issued a TRO and OSC regarding a preliminary injunction.

On June 7, 2017, Kaiser filed its petition to compel arbitration of Brown's claims based on the comprehensive arbitration clause in the evidence of coverage (EOC) for his plan. Kaiser claimed that Brown had enrolled in its health insurance plan online, and that the EOC provides for binding arbitration of all claims "aris[ing] from or . . . relat[ing] to an alleged violation of any duty incident to or arising out of or relating to" his plan/membership agreement/EOC. Regarding its compliance with section 1363.1, Kaiser claimed that its online enrollment screen displays the required "Arbitration Agreement" as "Step 8" of the enrollment process, and that immediately thereafter, the enrollee is required to provide an electronic signature to indicate his or her assent. Kaiser attached a copy of the electronic record of Brown's online enrollment, including his signature. R. Stacey Hicks, a Kaiser employee, authenticated the electronic record, and declared that "Brown received a separate screen regarding binding arbitration that appeared" in "Step 8." However, in the copy of the electronic record, "Step 8," which reads, "Sign the Kaiser Foundation Health Plan Arbitration Agreement," appears on the same page as "Step 7," which reads, "Sign the Application Agreement."

Brown opposed Kaiser's petition on the grounds that the arbitration provision failed to comply with section 1363.1 because it was not phrased in "clear and understandable language," and it was not "prominently displayed" immediately before the signature line. Brown challenged Hicks' declaration that the arbitration clause appears on "a separate screen." He also noted that she did not declare that exhibit B of her declaration "represents an identical copy of what Brown saw on his computer screen when he enrolled in the Kaiser plan." He offered the declaration of expert Anna Winningham, a Certified Information Systems Security Professional, who was retained to study the Kaiser enrollment process.

Winningham declared that she had reviewed the online enrollment process for the Platinum Plan using a "Macintosh desktop computer" and the "Safari internet browser" with the view setting at 100 percent. She declared that "[u]sing the zoom setting at 100% allows the user to view a webpage as designed by the website designer." Winningham analyzed the computer code on Kaiser's website to determine the way the website was

programmed to display the text appearing on a given page.[3] Her analysis determined that the website was programmed to display the text of "Step 7" in normal "Arial" font, with a font size of 12 pixels, but the text of the arbitration clause in "Step 8" in a smaller bold font size of 10 pixels. Winningham challenged Hicks' representation that "Brown received a separate screen regarding binding arbitration," stating that when she accessed Kaiser's website and went through the enrollment process, the "Arbitration Agreement" appeared on the same screen as the "Application Agreement." Winningham captured a screen shot showing how Kaiser's website actually displayed the two agreements on the computer and attached it to her declaration.

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[3] Paragraph No. 14 of Winningham's declaration reads: "Analysis of the site reveals that the 'Application Agreement' portion of this webpage is styled using the CSS class 'dataGroup.' This style rule sets the font to 'Arial' with a font size of 12 pixel (px). The font weight is normal, and it is not italicized." Winningham provided a "screenshot [which shows] a side-by-side image of the onscreen view of [the] webpage (left side), with the HTML code of the same page (right side). The pertinent line for the style rule for the 'Application Agreement' portion is highlighted."

Paragraph No. 15 of Winningham's declaration reads: "The 'Arbitration Agreement' section is also styled using the 'dataGroup' class, but uses inline HTML (that is, HTML that is actually a part of this document rather than called from a separate style sheet) to override the rule. The heading and body of this paragraph are both styled inline setting the font size to 10px, and the weight to bold." Winningham provided a "screenshot [which shows] a side-by-side image of the onscreen view of the 'Arbitration Agreement' section of the same webpage (left side), with the HTML code of the same section (right side). The relevant piece of code that makes this change to the paragraph header (text 'Arbitration Agreement') is highlighted."

Paragraph No. 16 of Winningham's declaration reads: "Similarly, the relevant piece of code that makes this change to font size to 10px, and the weight to bold to the paragraph body of the 'Arbitration Agreement' is highlighted."

In reply, Kaiser submitted the declaration of its counsel, Lawrence A. Cox, who avowed that the print screen function used by Winningham "apparently, will generate an accurate recitation of the text appearing on a computer screen, [but] it is not an accurate representation of how that text actually appears to the user in a browser window." Cox explained that he accessed the Kaiser website on different computers, using different size screens, including a large 19-inch monitor, a 14-inch monitor, and an 11-inch monitor. Attached to his declaration were photos of the display on his larger monitor and a screen shot taken while using an 11-inch monitor.

On July 5, 2017, Kaiser's petition was argued and the matter taken under submission. On August 25, 2017, the trial court denied the petition. While the court found that Kaiser had proven the existence of an "Arbitration Agreement" that covered Brown's claim, it concluded that Kaiser had not met "its burden to demonstrate the version of the arbitration provision presented to Plaintiff Brown was prominently displayed" under section 1363.1. The court noted that Brown presented expert testimony regarding information technology, which was not contradicted by Cox's declaration.

II. DISCUSSION

Kaiser raises several arguments to support its claim that the trial court erred in denying the petition to compel arbitration. We reject each argument and find no error.

A. Standard of Review.

"'A motion to compel arbitration is, in essence, a request for specific performance of a contractual agreement.'" (*Duffens v. Valenti* (2008) 161 Cal.App.4th 434, 443.) Accordingly, "'[w]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense.'" (*Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601, 612.)

"'[T]here is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed.'" (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.) "To the extent there are material facts in dispute, we accept the trial court's resolution of disputed facts when supported by substantial evidence; we presume the court found every fact and drew every permissible inference necessary to support its judgment." (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 953.)

B. Applicable Law.

"Section 1363.1 provides that if a health care service plan requires binding arbitration to settle disputes with its members, the plan must disclose that arbitration requirement in 'a separate article in the agreement issued to the employer group or individual subscriber.' [Citation.] In addition, that disclosure must be 'prominently displayed on the enrollment form signed by each subscriber or enrollee.' [Citation.] It is undisputed that '[a] violation of section 1363.1 renders a contractually binding arbitration provision in a health service plan enrollment form unenforceable.' [Citation.]

"In *Imbler v. PacifiCare of Cal., Inc*. (2002) 103 Cal.App.4th 567 . . . , the court observed that the dictionary definition of 'prominent' is '"standing out or projecting beyond a surface or line," or "readily noticeable."' [Citation.] We would add to that observation that the word 'prominent'—like its synonyms 'noticeable,' 'remarkable,' 'outstanding,' 'conspicuous,' 'salient,' and 'striking'—means 'attracting notice or attention.' [Citation.] More specifically, 'prominent' 'applies to something commanding notice by standing out from its surroundings or background.'" (*Burks v. Kaiser Foundation Health Plan, Inc*. (2008) 160 Cal.App.4th 1021, 1025-1026, fn. omitted (*Burks*).)

C. Analysis.

Kaiser argues that (1) the statutory requirement of "prominently displayed" should be narrowly constructed to harmonize it with the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) (FAA); (2) the trial court erred in placing the burden of proving compliance on

Kaiser; (3) the evidence is sufficient to show that the arbitration provision was "prominently displayed"; and (4) the online enrollment form substantially complied with section 1363.1.

1. The FAA does not preempt section 1363.1.

Kaiser contends that the trial court's enforcement of section 1363.1, subdivision (b), "[w]ithout describing any standard at all for what constitutes 'prominently displayed' . . . and ignoring evidence" to the contrary, shows "a hostility to arbitration that the FAA was enacted to dispel." We disagree. The trial court is not required to harmonize section 1363.1 with the FAA because the McCarran-Ferguson Act (15 U.S.C. § 1011 et. seq.) operates to shield the statute from preemption. (*Imbler v. PacifiCare of Cal., Inc.* (2002) 103 Cal.App.4th 567, 571-573 (*Imbler*) [The purpose of the McCarran-Ferguson Act was to "'*insure that the states would continue to enjoy broad authority in regulating the dealings between insurers and their policyholders*.'"]; *Smith v. PacifiCare Behavioral Health of Cal., Inc*. (2001) 93 Cal.App.4th 139, 152-162 [The FAA cannot preempt section 1363.1 because of the operation of the McCarran-Ferguson Act, which was enacted so that the primary regulation of the insurance business would lie with the states, not the federal government.].)

2. Kaiser has the burden of proving compliance with section 1363.1.

Kaiser claims the trial court erred in requiring it to demonstrate that its enrollment form complied with section 1363.1. Not so. Before Kaiser may compel arbitration of a dispute involving its health care service plan, it must establish the requirements of section 1363.1 were met.

"The plain language of section 1363.1 is clear—the arbitration disclosure requirements are mandatory. Section 1363.1 specifies that the arbitration agreement 'shall' contain each of the enumerated disclosures in subdivisions (a) through (d). It is well settled that the word 'shall' is usually construed as a mandatory term. [Citation.] This is particularly true here where to construe the statute as optional would render it ineffective, a construction that we must avoid. Moreover, it would be inconsistent with the legislative intent that these disclosures be included in '[a]ny health care service plan that includes terms that require binding arbitration . . . .' This language evidences an implicit legislative determination that these disclosures must be included in a health care service plan to safeguard against patients unknowingly waiving their constitutional right to a jury trial. Section 1363.1, therefore, establishes the requirements that *must be satisfied* in order to arbitrate disputes involving a health care service plan. Accordingly, even though section 1363.1 is silent on the effect of noncompliance, because the disclosure requirements are mandatory, the failure to comply with those requirements renders an arbitration provision unenforceable.

"Nothing in Code of Civil Procedure section 1281 prohibits the Legislature from establishing the requirements for the lawful contractual arbitration between a health care service plan and its participants. Section 1363.1 is not directed at arbitration agreements in general but is specifically applicable only to such provisions in health care service plan contracts. In this regard, the Legislature has specified these requirements in the context of health care service plans based on general state law contract principles. In doing so, the Legislature has determined that if the arbitration disclosure requirements are satisfied,

by definition, binding arbitration is a contract term and the arbitration provision is enforceable subject only to contract defenses. The converse must also be true. That is, absent the arbitration disclosure requirements of section 1363.1, the minimal requirements under state law contract principles have not been met and there is no contract to arbitrate that can be enforced." (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 64-65.)

Moreover, a petition to compel arbitration is essentially a suit in equity to compel specific performance of a contract. (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1040.) As the party seeking relief, the burden of proof rests on Kaiser to show compliance with all laws applicable to its contract in order to enforce it. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."].)

3. The arbitration provision was not "prominently displayed."

Kaiser contends that the arbitration provision was "prominently displayed." It faults the trial court for focusing solely on the size of the bold type and ignoring the other characteristics of the provision that differentiate it "from those in cases in which the disclosure has been found inadequate under section 1363.1." For the reasons stated herein, we reject Kaiser's contention.

We begin by noting that Kaiser failed to provide reliable evidence that showed what the arbitration provision looked like to Brown while he was filling out the application online. Instead, Kaiser submitted the declaration of Hicks who claimed that

the arbitration provision was displayed separately from the application's other provisions. However, the document attached as exhibit B to her declaration contradicted her claim. Moreover, she did not claim that either Kaiser's website or the document attached to her declaration was configured to display the arbitration provision exactly as it appeared to Brown. In contrast, Brown offered expert evidence to refute Hick's claims by showing that Kaiser's website in 2017 displayed the arbitration provision on the same screen as the "Application Agreement." Brown's expert further declared that Kaiser's website was programmed to display the arbitration provision in a smaller, albeit bold, font than that used for the "Application Agreement."

Notwithstanding the above, Kaiser argues that its arbitration provision was "prominently displayed" because it had a "separate heading," there was blank, "white space" around it, the instructions directing the enrollee to sign the arbitration provision were printed in "bold and underlined," the "typeface was bold," the "electronic signature block" was "directly below" the provision, and the enrollee "had to sign the arbitration agreement, agreeing to its terms, before he [or she] could complete the rest of the enrollment form." We consider these characteristics individually and collectively.

a. Separate heading.

The arbitration disclosure was preceded by the words "Arbitration Agreement," which appeared in the same size and font as the prior section's heading entitled "Application Agreement." In *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44 (*Malek*), the Court of Appeal found that the arbitration disclosure that was preceded by the words "**ARBITRATION AGREEMENT**" (in bold capital letters) failed to meet

the "prominently displayed" requirement of section 1363.1, subdivision (b), as "[t]he arbitration provision is in the same type size and font as provisions authorizing deductions and release of medical information. While the arbitration provision constitutes a separate numbered paragraph, it does not stand out and was not readily noticeable from these other provisions." (*Malek*, at pp. 51, fn. 2, 61; accord, *Robertson v. Health Net of California, Inc*. (2005) 132 Cal.App.4th 1419, 1428-1429 (*Robertson*) [the "prominently displayed" requirement was not met because the title of the arbitration clause was in bold print, but the provision was in the same font as the rest of the form and located some distance from the enrollee's signature].) Here, the same may be said about the heading "Arbitration Agreement."

b. Blank space surrounding the "Arbitration Disclosure."

The blank space surrounding the arbitration disclosure was no different than the blank space surrounding the prior provision. Setting off the arbitration provision from the other provisions by blank space before and after the provision does not give it greater prominence or make it easier to read when the other provisions are also set off by blank space before and after. (See *Malek, supra,* 121 Cal.App.4th at p. 61.)

c. Instructions printed in bold and underlined typeface.

Underneath the heading in the arbitration disclosure, enrollees were instructed to "Sign the Kaiser Foundation Health Plan Arbitration Agreement" and the substantive

paragraph regarding the arbitration disclosure was bolded.[4] The instruction, along with the entire provision, was displayed in 10 pixel, bold font, as opposed to the 12 pixel normal font, which was used for the other provisions. Case law has held that the use of a font that is the same size as that used for other text in the enrollment form, and with no typographical techniques used to draw the enrollee's eye to the text, fails to meet the "prominently displayed" requirement of section 1363.1. (See *Imbler*, *supra*, 103 Cal.App.4th at p. 579 [disclosure not prominently displayed—it "was in the same font as the rest of the paragraph, and was not bolded, underlined or italicized," and was sandwiched between sentences authorizing the release of medical records and authorizing payroll deduction of premiums/certification of Medicare coverage enrollment]; *Burks*, *supra*, 160 Cal.App.4th at pp. 1025, 1028-1029 [disclosure not prominently displayed—it was printed in substantially the same or smaller typeface as that used in the rest of the enrollment form, it was not highlighted, italicized or bolded, and it was placed as the only text above the signature line on the form]; *Robertson*, *supra*, 132 Cal.App.4th at p. 1428 [disclosure not prominently displayed—it was printed in the same typeface as used in the rest of the enrollment form despite the fact that the title was bolded].)

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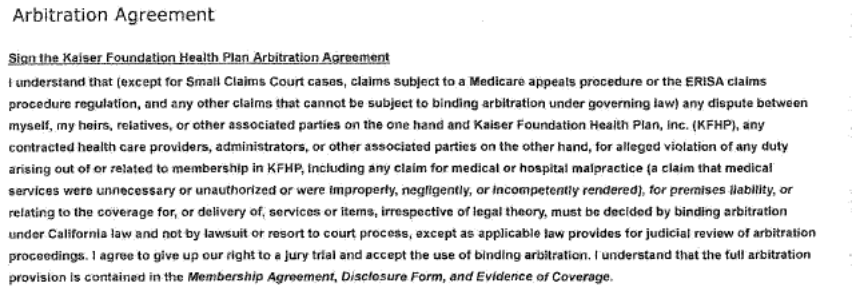
[4] This is the view of the "Arbitration Agreement" as displayed on the Kaiser website:



Arbitration Agreement

Sign the Kaiser Foundation Health Plan Arbitration Agreement

I understand that (except for Small Claims Court cases, claims subject to a Medicare appeals procedure or the ERISA claims procedure regulation, and any other claims that cannot be subject to binding arbitration under governing law) any dispute between myself, my heirs, relatives, or other associated parties on the one hand and Kaiser Foundation Health Plan, Inc. (KFHP), any contracted health care providers, administrators, or other associated parties on the other hand, for alleged violation of any duty arising out of or related to membership in KFHP, including any claim for medical or hospital malpractice (a claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered), for premises liability, or relating to the coverage for, or delivery of, services or items, irrespective of legal theory, must be decided by binding arbitration under California law and not by lawsuit or resort to court process, except as applicable law provides for judicial review of arbitration proceedings. I agree to give up our right to a jury trial and accept the use of binding arbitration. I understand that the full arbitration provision is contained in the *Membership Agreement, Disclosure Form, and Evidence of Coverage*.

To distinguish its arbitration disclosure text from those found to be insufficiently prominent, Kaiser bolded the font. However, because the font was *smaller* than the font used in the other provisions of the application, it was more difficult to read. Thus, any benefit that could have resulted from the bold highlighting was eclipsed by the smaller font size.

In contrast, the prior provision entitled "Application Agreement," began with the bolded term "**Important**" and was followed with bullet points to enhance clarity and readability.[5] Comparing these two provisions, it is apparent that the use of bold, smaller font failed to make the "Arbitration Agreement" stand out.

d. Placement of the electronic signature block.

Finally, the placement of the electronic signature block directly below the arbitration provision is insufficient to constitute "prominently displayed." "If placement of a legible arbitration disclosure immediately before the signature line were sufficient, in the judgment of the Legislature, to make that disclosure stand out from its surroundings,

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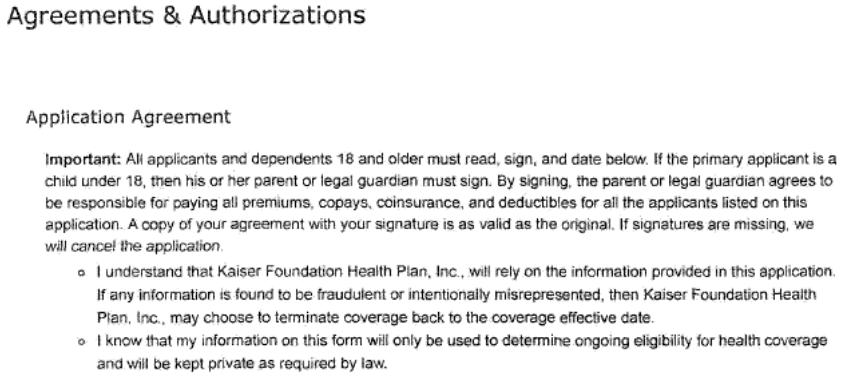
[5] This is the view of the "Application Agreement" as displayed on the Kaiser website:



Agreements & Authorizations

Application Agreement

Important: All applicants and dependents 18 and older must read, sign, and date below. If the primary applicant is a child under 18, then his or her parent or legal guardian must sign. By signing, the parent or legal guardian agrees to be responsible for paying all premiums, copays, coinsurance, and deductibles for all the applicants listed on this application. A copy of your agreement with your signature is as valid as the original. If signatures are missing, we *will cancel the application.*

- I understand that Kaiser Foundation Health Plan, Inc., will rely on the information provided in this application. If any information is found to be fraudulent or intentionally misrepresented, then Kaiser Foundation Health Plan, Inc., may choose to terminate coverage back to the coverage effective date.
- I know that my information on this form will only be used to determine ongoing eligibility for health coverage and will be kept private as required by law.

then there would have been no reason for the Legislature to separately mandate that the disclosure be 'prominently displayed' on the enrollment form. By requiring that the arbitration disclosure be displayed prominently *and* immediately before the signature line, the Legislature communicated its intent that something *other* than the placement of the disclosure would be needed to achieve the required prominence." (*Burks*, *supra*, 160 Cal.App.4th at p. 1027.) The location of the signature block, requiring Brown to sign the arbitration provision before he could complete the rest of the enrollment form, is irrelevant to the issue of whether Kaiser's arbitration disclosure was "prominently displayed."

e. The collective characteristics of the arbitration provision.

Although Kaiser argues that its arbitration disclosure is distinguishable from those found to be insufficiently prominent in the above-referenced cases, we are not persuaded. A view of the arbitration disclosure contained in Kaiser's enrollment form fails to draw an enrollee's eyes to the arbitration provision. (Compare fn. 4 to fn. 5.) While Kaiser has the right to choose what font, the size of the font, format, headings, and/or other devices to use to make the disclosure stand out (*Burks*, *supra*, 160 Cal.App.4th at p. 1028), its current choices have failed to achieve the prominence required by section 1363.1, subdivision (b). Accordingly, we conclude that the trial court did not err in denying Kaiser's petition to compel arbitration of Brown's claims. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 168 (*Zembsch*) [violation of § 1363.1 renders any arbitration provision unenforceable].)

4. Kaiser's enrollment form did not substantially comply with section 1363.1.

Alternatively, Kaiser asserts that its arbitration disclosure substantially complied with the essential purpose of section 1363.1 by disclosing "the requirement to arbitrate" and ensuring "a knowing waiver of the right to a jury trial" with the following: "'I agree to give up our right to a jury trial and accept the use of binding arbitration.'" According to Kaiser, if Brown did not know that he was waiving his right to a jury trial, then he chose not to read the provision before signing it; however, his failure to read the provision does not allow him to avoid its impact. Consequently, Kaiser argues that the arbitration provision must be enforced.

Initially, we acknowledge that it is unclear whether the doctrine of substantial compliance applies to section 1363.1. (*Zembsch*, *supra*, 146 Cal.App.4th at p. 166 ["there is some doubt whether section 1363.1 permits mere substantial compliance with its provisions"]; *Malek, supra*, 121 Cal.App.4th at p. 72 [the doctrine of substantial compliance excuses literal noncompliance only when there has been actual compliance with the essential objective of the statute; the objective of § 1363.1 is to ensure a knowing waiver of the right to a jury trial].) Assuming section 1363.1 does not bar application of the doctrine, we conclude that there has not been substantial compliance here.

"'"'"Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.' [Citation.] Where there is compliance as to all matters of substance technical

deviations are not to be given the stature of noncompliance. [Citation.] Substance prevails over form. When the plaintiff embarks [on a course of substantial compliance], every reasonable objective of [the statute at issue] has been satisfied."'" (*Malek, supra*, 121 Cal.App.4th at p. 72; see *Zembsch, supra*, 146 Cal.App.4th at p. 166 [The doctrine of substantial compliance "'excuses literal noncompliance *only* when there has been "actual compliance in respect to the substance essential to every reasonable objective of the statute."'"].)

Appellate courts have rejected substantial compliance arguments when the required arbitration disclosure was "in the same font as the preceding paragraph, . . . 'not bolded, underlined or italicized'" (*Zembsch, supra*, 146 Cal.App.4th at p. 165), failed to stand out from the remainder of the form (*Burks, supra*, 160 Cal.App.4th at pp. 1024-1025), or was "in the same typeface as the rest of the document with only its two word title in bolded print" (*Robertson, supra*, 132 Cal.App.4th at p. 1431). In short, "[a]n enrollment form that does not have the required arbitration disclosure *prominently displayed* . . . does not substantially comply with that statute." (*Burks*, at p. 1029, italics added.) Here, Kaiser's arbitration provision did not satisfy the prominence requirement of section 1363.1, subdivision (b). We therefore conclude Kaiser may not rely on the substantial compliance doctrine.

III. DISPOSITION

The order denying the petition to compel arbitration is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.